Supreme Court, U.S.
FILED
MAY 6 1978
MICHAEL RODAK, JR., CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-1415

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Petitioner

VERSUS

D. H. HOLMES COMPANY, LTD.,

Respondent

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioner

versus

D. H. HOLMES COMPANY, LTD.,
Respondent

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Respondent D. H. Holmes Company, Ltd. opposes the petition of the Equal Employment Opportunity Commission for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit in this case and respectfully urges the Court to deny the writ.

OPINIONS BELOW

The opinion of the court of appeals is reported at 556 F. 2d 787, and is reproduced at Appendix A of the Solicitor General's petition. The opinion of the district court is not officially reported, but is unofficially reported at 13 FEP Cases 449, and is reproduced at Appendix D of the Petition.

JURISDICTION

The judgment of the court of appeals was entered July 29, 1977 (Petition App. B). A timely petition for rehearing and a suggestion for rehearing *en banc* was denied on December 5, 1977 (Petition App. C) after a majority of Circuit Judges in regular active service did not vote in favor of it. On February 22, 1978, Mr. Justice Powell extended the time for filing a petition for writ of certiorari to and including April 4, 1978. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether a class action filed by the Equal Employment Opportunity Commission pursuant to §706(f) (1) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-5(f) (1) (Supp. V 1975) is to be governed by and subject to the provisions of Rule 23 F.R.Civ.P.[1]

STATUTES INVOLVED

Section 706(f) (1) of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-5(f) (1) (Supp. V 1975), provides:

1. Implicit in this question is the proposition that this *is* a class action. In the trial court and court of appeals petitioner took the position that this was not a class action, but rather an action seeking "broad injunctive and monetary relief for a class of persons." Petitioner's arguments have been refined somewhat since then and, from a fair reading of the instant petition, it now appears that petitioner concedes this is indeed a class action, albeit one not governed by Rule 23.

> If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States District Court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section, is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, which ever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission or the

Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

Rule 23 of the Federal Rules of Civil Procedure provides in pertinent part:

CLASS ACTIONS

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or agianst individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

STATEMENT

The underlying dispute here concerns alleged instances of sex discrimination in employment. Respondent D. H. Holmes Company, Ltd. (Holmes), a Louisiana corporation which operates nine retail department stores in three states with approximately 3,500 employees in 494 departments, is alleged to have violated certain provisions of Title VII of the Civil Rights Act of 1964, as amended, 49 U.S.C. §2000e *et seq.*

In early October 1973, Joseph Tardo, security supervisor at respondent's suburban New Orleans Lakeside store, was transferred to another suburban store and replaced at Lakeside by a new (male) security supervisor. On October 15, 1973, his first day in his new job, the new Lakeside security supervisor allegedly grabbed the arm of Maria Marino, a store

detective with some years experience and a subordinate of his. The next day the new supervisor allegedly rubbed against Mrs. Marino. Sharon Neidhardt, another store detective at Lakeside, alleged that she too was the object of "sexual advances" by the new supervisor on October 22. The two women reported these alleged incidents to upper management. After an investigation by management, the allegations were found to be completely groundless and the two women were discharged for having falsely accused the supervisor.[2]

Mrs. Marino filed a charge with the EEOC alleging that when Mr. Tardo left she should have been promoted into his place as new security supervisor instead of the male, and that her sex was the reason she did not get the promotion. She also alleged that she was discharged because she reported the alleged "sexual advances" to upper management. Sharon Neidhardt also filed a charge with the EEOC alleging that she had been discharged because she reported to upper management the alleged "sexual advance" made to her by the same supervisor.

Three other charges were filed with the EEOC. In November 1973, Pamela Clark, a display artist, filed a charge with the EEOC alleging that she had been discharged because of her sex. In January 1974, Beverly Saxon, a security department employee as were Mesdames Marino and Neidhardt, filed a charge with the EEOC alleging that she had been denied a promotion because of her sex. In March 1974, another security department employee, Joseph Tardo, Mrs.

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2. As noted by the circuit court, there has been no finding of facts by the trial court. This fact recitation is taken from the circuit court opinion where, for purposes of the appeal, the record made pursuant to discovery was construed most favorably to petitioner. (Petitioner's App. A, pp. 2A-7A.)

Marino's former supervisor at the Lakeside store whose transfer in October 1973 set in motion the subsequent events of that month, filed a charge with the EEOC alleging that he had been discharged for failing to cooperate with respondent in its defense of Mrs. Marino's charge during the EEOC investigation.

In September 1975, the EEOC filed suit against Holmes in the Eastern District of Louisiana. It filed an initial complaint against alleged practices at the Lakeside store and later amended the complaint to include all the other stores. The amended complaint, filed in March 1976, is drawn in the most general terms. It broadly alleges violations of §703 and §704 of Title VII, 42 U.S.C. § §2000e-2 and 2000e-3, commencing on July 2, 1965 (the effective date of Title VII) and continuing thereafter. It seeks monetary and injunctive relief on behalf of "all those affected" but does not further identify this class in the complaint (Petit. App. pp. 7A, 8A).

As a result of the amended complaint, it became clear to Holmes that now, the EEOC was not suing on behalf of the five charging parties only, but rather on behalf of a broad class of persons. Holmes realized that although the complaint was not styled as a class action, it was in fact now the defendant in a sprawling class action lawsuit without being afforded any of the protections and judicial controls of Rule 23 F.R.Civ.P. Holmes therefore moved, in June 1976, to dismiss the class action aspect of the complaint.

The district court held that although the complaint was not denominated a class action, it was a *de facto* class action and that, therefore, the appropriate rules governing class actions must come into play. Accordingly, the district court

gave EEOC ninety days within which to comply with Rule 23 F.R.Civ.P. and with local rule 2.12.[3] Rather than comply with the district court order, the EEOC sought and obtained interlocutory review pursuant to 28 U.S.C. § 1292(b).

The court of appeals, agreeing with Holmes and the district court, affirmed, holding that this action is a class action and that the EEOC must comply with Rule 23 (Petit. App. p. 23A).

REASONS FOR DENYING THE WRIT

1. The decision of the court of appeals is not in conflict with any other appellate court decision nor is it in conflict with any decision of this Court.

The petition points out that there is a division of opinion on the question presented here at the district court level (Petit. App. p. 12). However, as the Petitioner also points out, there are no other circuits which have decided the question, and therefore no conflicting decisions from other circuits. There is now, however, another Fifth Circuit decision on point, *viz., Equal Employment Opportunity Commission v. Datapoint Corp.*, (5 Cir. April 7, 1978) No. 76-2862,__ F.

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3. Local rule 2.12 provides in pertinent part that:

c. Within 90 days after the filing of a complaint in a class action, unless this period is extended on motion for good cause appearing, the plaintiff shall move for a determination under subdivision (c) (1) of Rule 23, F.R.Civ.P., as to whether the case is to be maintained as a class action. In ruling upon such a motion, the court may allow the action to be so maintained, may disallow and strike the class action allegations, or may order postponement of the determination pending discovery or such other preliminary procedures as appear to be appropriate and necessary in the circumstances. Whenever possible, where it is held that the determination shall be postponed, a date will be fixed by the court for renewal of the motion.

2d ___. This decision reaffirms the view of the Fifth Circuit that class actions brought by the EEOC under § 706(f) (1) of Title VII are subject to Rule 23 treatment.

Thus there are now two Fifth Circuit decisions, consistent with each other, affirming that Rule 23 applies to class actions brought by the EEOC and no conflicting decisions of any other appellate courts or of this Court.[4] Thus there is clearly no necessity or need for review by this Court.

The essence of Petitioner's petition is simply that the circuit court was wrong. While we do not agree, we respectfully point out that it has historically not been the function of this Court to simply correct errors of inferior federal courts. Address of Chief Justice Vinson before American Bar Association, Sept. 7, 1949, 69 S.Ct. v, vii. The fact that petitioner has been disappointed by the decision below does not make a case of sufficient stature to invoke the jurisdiction of this Court. As to any conflicts between district courts or between district courts and courts of appeal, it is for the appeals courts in the first instance to deal with such conflicts. There is no conflict among the appellate courts on this question and it would be premature to assume that there will be. If, as, and when such conflicts may develop between the appellate courts, it may become appropriate for this Court to consider the question; but to do so now would be premature and would simply be to indulge a disappointed loser who believes the circuit court made a mistake.[5]

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4. The decision in *Equal Employment Opportunity Commission v. Continental Oil Co.*, (D. Colo.) 13 FEP Cases 785, is in accord with the decision herein and was appealed to the Tenth Circuit. That circuit did not reach the Rule 23 question, however, and affirmed on other grounds. 548 F.2d 884 (10 Cir. 1977).

5. The Solicitor General asserts that the importance of the instant decision to EEOC enforcement actions, alone, warrants review, despite

Furthermore, close analysis of the circuit court's decision indicates that review by this Court is clearly not warranted because that decision is obviously correct. The opinion of the circuit court eloquently speaks for itself and needs no embellishment; however, solely for emphasis we will make a few brief points.

2. The reasons for application of Rule 23 to a class action are no less compelling when the EEOC is plaintiff than in any other class action. There is no basis in reason or in law why the EEOC should not have to comply with Rule 23 just as any other supplicant before the court who seeks class relief. The policy goals which Rule 23 was promulgated to achieve will be served as much by its application here as in any other class action. Nor will achievement of the national goal of eliminating employment discrimination be inhibited by application of Rule 23 here.

Rule 23 helps prevent piecemeal suits, saving time and expense. It permits the efficient resolution of the claims or liabilities of many individuals in a single action, and the elimination of repetitious litigation and possible inconsistent adjudications involving common questions, related events, or requests for similar relief. At the same time, it affords defendants some measure of protection against duplicative re-

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(Footnote 5 continued)

the absence of any conflict among the circuits. (Petit. p. 13). Assuming arguendo that the question is that important, we submit that fact would militate against granting the writ here, so that this issue can undergo thorough and complete ventilation under varying circumstances and in other circuits prior to consideration by this Court, should that ever become necessary.

coveries and it establishes a degree of control to check possible abuse of the class device. All of these interests remain compelling regardless of the identity of the plaintiff. As Judge Kunzig said in the opinion below: "If EEOC is exempted from Rule 23, chaos in management of Title VII class actions could result. Such matters as notice, exclusion, intervention, dismissal or compromise, and statute of limitations treatment would be put in question." (Petit. App. p. 19A)

The protection afforded a defendant is particularly appropriate in this case where, on the basis of charges from five individuals, four of them in one non-retail department (security) where some quite unique incidents allegedly happened, the EEOC has sought to balloon the action into one encompassing all 494 departments in all 9 of respondent's retail outlets in three states, using the broad federal discovery devices, pushing for class discovery without submitting to class action controls (and, in fact, resisting them). (Petit. App. pp. 19A, 20A) Months after the EEOC filed its initial complaint Holmes still did not know the precise nature of the "broad class of persons" on whose behalf EEOC was proceeding. EEOC would not say; it chose instead to file this appeal.

The reason it would not say is because it did not know. It was seeking a class "as broad as. . . syntax and ingenuity [would] allow."[6] Having gotten its foot in the courthouse door via the five charging parties and the original complaint, it was now, belatedly, conducting an investigation under the aegis of the liberal federal discovery rules. As Judge Kunzig

6. Concurring opinion of Judge Godbold in *Johnson v. Georgia Highway Express,* (5 Cir. 1969) 417 F.2d 1122.

said below, "Here EEOC is using the federal rules to conduct what may be a wide-ranging investigation into Holmes' affairs. But to the extent that it goes beyond the five identified complainants (and nobody seems to know just how far it goes), it looks like an investigation in search of a plaintiff. Certainly there is a right to investigate and a right to institute court action, but always under appropriate court rules which must protect all parties." (Petit. App. p. 22A)

As this Court said in *Hawaii v. Standard Oil*, 405 U.S. 251, 31 L.Ed.2d 184, 92 S.Ct. 885 (1972), "Rule 23 provides specific rules for delineating the appropriate plaintiff class [and] establishes who is bound by the action . . . ." If petitioner herein is not required to observe the requisites of Rule 23 we will not have any delineation of the plaintiff class. We will not know on whose behalf plaintiff is suing or who will be bound by the judgment. Will it be all women, or something less? If les, how much less? Will it be all former female employees of respondent? All present female employees? All female employees who failed to get promotions? All female applicants who failed to get a job? Will it be limited to certain job classifications? Will it be limited to certain stores or certain departments? Will it include retail sales departments?[7] Will it include female employees who have not been the object of "sexual advances"? The district court gave petitioner 90 days (plenty of time for additional discovery) to attempt to formulate answers to such questions in accordance with Rule 23, but it refused to even try. It filed this appeal instead, claiming that, as the sovereign, it does not have to answer such questions.

As Judge Godbold said in this concurring opinion in *Johnson v. Georgia Highway Express*, supra, "[T]he pleadings structure no class by defined acts, by time, by persons, by

7. The majority of respondent's employees work in retail sales departments. None of the charging parties did.

plant, by department, by supervisor or by any other means. The appellant has done no more than name the preserve on which he intends to hunt." That is all the EEOC has done here and all it intends to do.

A graphic example of the kind of abuse which would result if this Agency (or any other plaintiff) were not subject to the constraints of Rule 23 is found in the recent Fifth Circuit case, *Equal Employment Opportunity Commission v. Datapoint Corp.*, supra. There the district court certified the EEOC as class representative, the case was litigated all the way to final judgment and, the EEOC lost. On appeal to the Fifth Circuit the EEOC took the position that, although the members of the class would have enjoyed the benefits of backpay and a permanent injunction against Datapoint had the EEOC succeeded in its suit, nevertheless those individuals should not be bound by a decision unfavorable to the EEOC! The only reason the agency would possibly take that position is so the individuals on whose behalf it sued could themselves now sue should they choose to do so.[8] Yet in the instant case the petitioner unabashedly asserts that there would be little if any chance of repetitious suits or duplicative recovery. The effect of *Datapoint* and the decision below will be to prevent this kind of abuse. The decision should be allowed to stand.

3. The petitioner says it cannot comply with Rule 23 because, as the sovereign it represents the public, not the private interest. It says the public interest cannot fit within the framework of Rule 23. These phrases are repeated as a mantra, or incantation intended to convey lofty purpose. However, the words ring hollow. Petitioner never really

8. This is known in some circles as "heads we win, tails you lose."

says how the public and private interest are incompatible, except to suggest at one point that, when employee A sues for backpay it is a suit for money for A, but when petitioner sues for backpay for A it is to vindicate public policy. This is a distinction without a difference. When A brings a class action seeking backpay for himself and those he represents, does it not vindicate public policy? And when petitioner brings a class action seeking backpay, does it not vindicate private as well as public interest?

Indeed, private Title VII class action plaintiffs have been vindicating both public and private interests for years, pursuant to § 706(f) (1) of Title VII and Rule 23, the same sections and Rule involved herein. It has posed no problem for them. *Oatis v. Crown Zellerbach*, (5 Cir. 1968) 398 F. 2d 496. And for years we have been told by the courts that one reason for allowing such plaintiffs to maintain class actions under Rule 23 was because such (Title VII) actions were not private in nature, only, but were heavily freighted with the public interest. Indeed we are told that such plaintiffs act not only for themselves alone, but as "private attorneys general," vindicating a policy that Congress considered of the highest priority, *Oatis v. Crown Zellerbach*, supra; and that such actions have "extreme importance with heavy overtones of public interest"; that when an individual files such an action he takes on the "mantle of the sovereign." *Jenkins v. United Gas Corporation*, (5 Cir. 1968) 400 F.2d 28, 32.[9] Yet we are now confronted with the unlikely spectacle of the sovereign attempting to avoid having to conform to

9. See also *Bowe v. Colgate Palmolive Company*, (7 Cir. 1969) 416 F. 2d 711; *Huff v. N.D. Cass Company of Alabama*, (5 Cir. 1973) 485 F. 2d 710; *Burns v. Thiokol Chemical Corporation* (5 Cir. 1973) 483 F. 2d 300; *Sanchez v. Standard Brands, Inc.*, (5 Cir. 1970) 431 F.2d 455; *Wheeler v. American Home Products*, (5 Cir. 1977) 563 F.2d 1233).

Rule 23 as do lesser supplicants before the Court, on the ground that it cannot vindicate both the public and the private interest at one and the same time. We submit that if all those private attorneys general can enforce both private and public interests in one action, compatibly, then certainly the EEOC can do it too. The public interest and the private interest are clearly not incompatible in this context.

4. The petitioner makes the dubious assertion that class actions brought by the Commission pursuant to §706 are not subject to Rule 23 because neither Title VII nor its legislative history say they are subject to it. Of course the Commission has it backward. Rule 1 F.R.Civ.P. states that "these rules govern. . . all suits of a civil nature. . . at law or in equity . . . ." And while there are exceptions to this general rule, the exceptions are not implied by Congressional silence; where they occur they are express. For example, Congress has provided that claims for minimum wages under the Fair Labor Standards Act cannot be maintained as class actions under Rule 23. That is because § 16(b) of that act, 29 U.S.C. §216(b), limits the binding effect of a judgment adjudicating rights under the FLSA to persons who have filed written consent to become parties to the suit. And to insure that result, the Advisory Committee Note to the 1966 amendments to Rule 23 explicity stated, "The present provisions of 29 U.S.C. § 216(b) are not intended to be affected by Rule 23, as amended." Advisory Committee Note 39 F.R.D. 69, 104. See also the reference in the opinion below to proceedings under the Bankruptcy Act, had under special rules of procedure promulgated by authority of 28 U.S.C. § 2075. (Petit. App. 17A fn. 12)

By contrast, there is nothing either in Title VII or the

Federal Rules of Civil Procedure which would indicate an intention of Congress or this Court to exempt the EEOC from Rule 23. The only exceptions stated in the rules are those found in Rule 81 F.R.Civ.P. The National Labor Relations Board is one such exception; the EEOC is not. As Judge Kunzig said below, "If Congress or the Supreme Court had wanted to include the EEOC among the exceptions, they clearly had the power to do so. 28 U.S.C. § 2072 (1970 & Supp. V 1975). They did not do so here." (Petit. App. 17A)

To the contrary, subdivision (b) (2) was added to Rule 23 in 1966 in part to make it clear that the class action device is available and appropriate in civil rights suits. The Advisory Committee Note says in part, "This subdivision is intended to reach situations where a party has taken action or refused to take action with respect to a class. . . . Illustrative are various actions in the civil rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration." Advisory Committee Note 39 F.R.D. 69, 102. That comment seems tailor-made to fit the kind of action petitioner is bringing herein. Although the Federal Rules were revised in 1966, before the EEOC had authority to sue, there is nothing in the Rule itself or in the Advisory Committee Note which would indicate that a class action civil rights suit brought by a federal agency ought to be exempt from the federal rules governing class actions.

5. Petitioner suggests that Rule 23 cannot apply to it because it is not a member of a class of aggrieved females. While it is true that there are cases which say that at least one of the named individual plaintiffs must be a member of the

class, this case is more closely analogous to cases in which associations such as trade unions, school boards, etc. have sued on behalf of their members. In many of these cases the "member of the class" issue has resolved itself into, whether or not the association is a real party in interest in the sense of Rule 17 F.R.Civ.P. Surely the EEOC *is* a real party in interest in the sense of Rule 17(a). It is made so by § 706(f) (1) of Title VII.

Further, some courts have recognized that if an organization has specific authority or has been created especially to protect the particular interests of its members, it can maintain an action on their behalf pursuant to Rule 23. For example, in *Norwalk CORE v. Norwalk Redevelopment Agency*, (2 Cir. 1968) 395 F.2d 920, 937, the court stated that: "[T]he reasons for requiring an individual plaintiff in a class action to be a member of the class do not necessarily preclude an association from representing a class where its *raison d'etre* is to represent the interests of that class." It cannot be denied that the EEOC's reason for being is to represent the interests of persons who claim to have been discriminated against in violation of Title VII, as well as the public interest inherent therein.[10]

In some cases, particularly civil rights cases, the "member of the class" question equates actually to a question of standing. The Eighth Circuit has held that if the representative party has standing to sue and is a real party in interest under Rule 17(a), then it should not be dismissed from the action on the ground that technically it is not an individual member of the class. In *Smith v. Board of Education of Morrilton*

10. This factor alone distinguishes the instant situation from those cases cited in footnote 3 of the petition herein. (Petition p. 12)

School District No. 32, (8 Cir. 1966) 365 F.2d 77 (per Blackmum, J.), the Arkansas Teachers Association sought an injunction requiring the employment of high school teachers without regard to race. The district court dismissed the case on the merits and an appeal was taken. The Eighth Circuit determined that the Association had standing to bring the action and the fact that it was not a "member" of the class was not relevant and did not require a dismissal. "This approach seems sound inasmuch as the primary consideration should be whether the party can adequately represent the interests of the class. Once adequacy of representation and standing are established, the action should not be defeated because of the technical point that an organization, which is the real party in interest, is not a member of itself." Wright & Miller, Federal Practice and Procedure: Civil §1761.

That test is met here. The EEOC has been given standing by Congress in § 706 of Title VII. Further, it clearly meets the "adequacy of representation" test laid down by the Fifth Circuit in *Johnson v. Georgia Highway Express*, supra. Measured by the standards enunciated therein, the EEOC is not only an adequate class representative, but is indeed a class representative *par excellence*. It would be difficult to imagine any person or entity more qualified, experienced and generally able to conduct a proposed Title VII class litigation than the agency created to enforce that statute. Thus, adequacy of representation and standing are surely established here, and the EEOC cannot escape the application of Rule 23 because of the technical point that it is not a "member" of the class.

6. Finally we again echo the words of Judge Kunzig in the opinion below: "Only through properly functioning judicial procedures will the interests of either party be protected in

the long run. Absent a Congressionally developed alternative, there can be no good accomplished by an abandonment of Rule 23 in this case. In no way will the national goal of gaining equal employment opportunity be advanced by precipitously discarding our established rules of procedure." (Petit. App. 19A)

CONCLUSION

The decision of the United States Court of Appeal for the Fifth Circuit in affirming the trial court was correct and the writ of certiorari should be denied.

Respectfully submitted,

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Attorneys for Respondent

CERTIFICATE

I hereby certify that a copy of the above and foregoing Opposition to Petition for Writ of Certiorari has been this day forwarded to all counsel of record by depositing a copy of same, postage prepaid, in the United States mail, as addressed below, on this 5th day of May, 1978.

Wade H. McCree, Jr., Esq.
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